United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

376

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24197

UNITED STATES,

Appellee,

v.

E. NEIL ROGERS,

Appellant.

Appeal from Judgment
of the United States
District Court for the
District of Columbia

BRIEF FOR APPELLANT

Farley W. Warner

2017 "Que" Street, N.W.
Washington, D.C. 20009.

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STATEMENT OF ISSUES PRESENTED

1. Did the Trial Court err in denying Defendant's Motion to Suppress Material Evidence obtained by Government investigators who clothed their investigation as a "civil tax audit" and who, from the outset, were engaged in a general search for evidence of criminal misconduct, all in violation of Defendant's Fourth, Fifth and Sixth Amendment rights under the Constitution of the United States?

2. Did the Trial Court err in denying the Defendant's Motion to Dismiss the Indictment because it had not been read in its entirety by any member of the Grand Jury nor concurred in by the requisite number as required by the Fifth Amendment to the Constitution of the United States and Rule 6 of the Federal Rules of Criminal Proceedure?

3. Did the Trial Court err in denying as untimely filed Defendant's Motion to Dismiss the Indictment where it was filed immediately upon learning that it was defective in that it had not been read nor concurred in by the requisite number of Grand Jurors?

4. Can the Government prove the essential element of reliance through evidence of the putative victim's general banking practice rather than through evidence of its actual reliance on the allegedly false documents specified in the indictment?

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6. Was Defendant's right to due process under the Fifth Amendment to the Constitution of the United States or his right to a speedy trial under the Sixth Amendment to the Constitution of the United States denied where the Government delayed over three years before seeking an indictment?

7. Did the Trial Court err in refusing to give the "Missing Witness" instruction to the jury before deliberation?

8. Did the Trial Court err in denying motions for a new trial or for acquittal after presentation of new documentary evidence establishing knowledge of putative victim which is inconsistant with the essential element of reliance?

STATEMENT PURSUANT TO RULE 8(d) OF THE RULES OF THIS COURT

This case was previously before this Court under the name of Reynolds, et al. v. United States, No. 23006, on May 5, 1969, on petition for a writ in the nature of prohibition or mandamus, and a motion for stay of the trial scheduled to commence that day. The petition was based upon the jurisdictional defect in the indictment. It was denied without opinion on May 5, 1969.

REFERENCES TO RULINGS

The rulings in which the Court below set forth the bases of the orders and judgments presented for review by this Court appear in written opinions and trial rulings as follows:

Pre-trial Memorandum and Order, September 5, 1968, pp. 8-30; Pre-trial Memorandum and Order, May 2, 1969, pp 2-6, 300 F. Supp. 503 et seq. (D.C. 1969); Post-trial Memorandum and Order, December 24, 1969, pp. 2-13; Transcript May 16, 1969, pp. 18-22, 23-24; and Transcript May 5, 1969, pp. 15-17.

STATEMENT OF THE CASE

Appellant E. Neil Rogers and five co-defendants, Walter R. Reynolds, Harlan E. Freeman, A. Claiborne Leigh, R. Marbury Stamp and Bertram G. Dienelt, Jr., were indicted on September 22, 1967, on thirteen Counts. Count One charged that all six defendants, in violation of Title 18 U.S.C. Section 371, conspired to violate D. C. Code Section 22-1301 (false pretenses) and Section 22-1401 (forgery) by submitting false and fraudulent documents to a savings and loan association in connection with a re-financing of outstanding construction loans on seventeen parcels of real estate. (J.A._____Indictment, pp.1-9). Counts Two through Thirteen charged all defendants, except Dienelt, with substantive violations of D. C. Code Section 22-1301, each count involving one of twelve of the parcels described on Count One.(J.A._____Indictment,pp10-21). On May 20, 1969, all defendants, except Dienelt (who was acquitted), were convicted on all counts. (J.A._____ [Criminal Docket, supplemental pg. 9]).

All of the remaining defendants, except A. Claiborne Leigh, appealed the conviction and by order of this Court dated July 2, 1970, all four appeals were consolidated. The opinions of the Court below are printed as an Appendix to the brief of the Appellant Walter R. Reynolds, Case No. 24,198.

On February 18, 1970, the trial judge (Robinson, J.) sentenced Rogers to a term of twenty months to five years on Count One, ordering him to spend three months in jail and suspending the balance of the sentence. On Counts Two through thirteen the trial judge suspended imposition of sentence. After he serves his sentence, Rogers is to be placed on probation for two years.

All defendants sentenced have appealed, EXCEPT LEIGH.

In the following Statement of Fatcs and Argument these abbreviations are used: TSH refers to the Transcript of the Motion to Suppress held June 4,and 5, 1968, TQ refers to the Transcript of the Motion to Dismiss the Indictment, held on April 28, 1969, and TT refers to the Trial Transcript; App. refers to the appendices (and pagination) in the Brief of Appellant Reynolds.

STATEMENT OF FACTS

1/

A. The Investigation.

Prior to 1963 the Organized Crime and Racketeering Section of the Criminal Division, Department of Justice, and the Internal Revenue Service formed a special project known as the "Metro-Project" (TSH 135-36) to investigate corruption among public officials of Fairfax County, Virginia (TSH 43-44, App. [2,3]).

Edward Joyce, an attorney for the Department of Justice and the man who drafted Title 18, Section 1952, U. S. Code, commonly known as the Organized Crime Statute (TSH 163) was the legal advisor to this Project (TSH 136). Agents from Washington, D.C., Mt. Vernon, Ill., Atlantic City, N.J., Erie, Pa., Philadelphia, Pa., Gary, Ind., Baltimore, Md., Richmond, Va., and Ft. Lauderdale, Fla., were involved in the investigation (Pg. 24, Schedule A, Government's Consolidated Response to Motion of Defendants' Requests for Bills of Particulars Pursuant to Rule 2).

A special office was established for the Project on Washington Street, Alexandria, Virginia, (TSH 51), separate and

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1/ The background facts herein set forth are drawn from the findings of the trial court in its Memorandum of Opinion denying defendants' motion to suppress evidence (App. [1-30]) and are supplemented by uncontradicted facts contained in the transcript of the two-day hearing on defendants' motions to suppress evidence and quash the indictment on speedy trial ground. (TSH, generally)

apart from the regular IRS office (TSH 56), where the agents especially selected from other parts of the United States reported (TSH 51).

The Project made its reports in the beginning to the Assistant Regional Commissioner of Intelligence in Cincinnati, Ohio (TSH 103) and later was placed under the direct jurisdiction of the District Director for the Richmond District (TSH 104). The Project was directed by Oral Cole, a Special IRS agent (App.[2,3]). Later Cole was succeeded by Kenneth E. McElroy, another Special Agent of IRS (TSH 73). A small portion of the Project's staff consisted of Special Agent McElroy to whom revenue agents Hansel (TSH 100, 218), Evangelist (TSH 47) and Shelton (TSH 256) reported their findings.

A principal target of the Metro Project was defendant A. Claiborne Leigh, who had served as Chairman of the Fairfax County Board of Supervisors (App.[2]) and who, with Appellant Rogers, had been a member of the law firm of Leigh & Rogers during the time in question (TSH 109-110).

It was suspected by IRS agents that Leigh had taken bribes (App.[2], TSH 48). In June, 1963, revenue agent Hansell commenced an examination of Leigh's income tax returns for the early 1960's (App.[3]). Hansel obtained Leigh's permission to inspect records maintained at his law office (App.[3], TSH 213,220).

After microfilming Leigh's files between June and November, 1963, (TSH 220), agents McElroy and Hansel determined from check spreads "- - - which showed these different checks being paid to these various people, and by analyzing the

check spread, it appeared to be (sic) that something was unusual" (TSH 177-178).

These "irregularities" were criminal in nature (as the Trial Court found]App. 21]), and on January 20, 1964, Special Agent McElroy went to Leigh's office and after first advising him that he was being investigated for criminal income tax evasion (no mention was made of the non-tax criminal nature of the investigation), He, with revenue agent Hansel, received permission and microfilmed the Leigh (& Rogers) settlement files involving the client Reynolds (TSH 175) on January 20, 21, 22 and 23, 1964, (TSH 134, 175).

On February 19, 1964, Special Agent McElroy, accompanied by revenue agent Shelton, called upon Appellant Rogers in his office (TSH 123) and "advised him that we were making an investigation of A. Claiborne Leigh" (TSH 125). "I was not investigating him (Rogers), I told him I was not investigating him, and I also tried to make it clear to him that I definitely was not doing it" (TSH 126).

> "Q. You [McElroy] were conducting a criminal investigation involving Mr. Leigh and you discussed it with his law partner but did not warn him [Rogers] of his constitutional rights? (TSH 128)
>
> A. That's right." (TSH 128)

Special Agent McElroy admittedly confirmed on or about March 4, 1964, the "irregularities" (TSH 176-178) found in December, 1963, (apparently the straw transactions) (TSH 134, 175), for shortly thereafter he made an investigation of the "straws" (TSH 179). He could not find them in the telephone

book (TSH 179). He could not find them from the records of Fairfax County (TSH 179).

Later, in March, 1964, the accountant for Reynolds was questioned concerning these straw transactions (TSH 12,15) by revenue agent Evangelist who at first proposed to disallow the deductions involved in the straw transactions "on the basis that they were against public policy" (TSH 20). At no time did the agent inform anyone in the Reynolds organization, including Reynolds himself, of the crime he was investigating (TSH 44).

Between March and July, 1964, Evangelist discussed the straw transactions with Defendant Freeman (TSH 74). In fact, this agent knew of the straw transactions before interviewing Freeman (TSH 71) and, further, was informed by Freeman that he (Freeman) had signed the names of the required signatures (TSH 71,72).

Special Agent McElroy then visited the Eastern Building and Loan Association (hereinafter referred to as the Bank) offices October 19, 1964 (TSH 108) and examined their records as well as giving them an official summons to obtain specific records (TSH 109).

On October 28, 1964, Special Agent McElroy, during a lengthy meeting with Rogers at the special IRS offices (TSH 132) discussed the straw transactions (TSH 132). Again on November 6, 1964, Rogers met with Special Agent McElroy at the special IRS office and discussed the straw transactions (TSH 134).

Despite the obvious non-tax nature of the investigation, Rogers was given no warning of his possible criminal involvement prior to these lengthy interviews which involved the straw transactions as Special Agent McElroy testified:

> "A. There were two meetings with Mr. Rogers in our office in Alexandria, Virginia. One was on October 28, 1964, and the other one on November 6, 1964. At this time we went over the settlement files, and discussed some aspects of these files, and I am sure during this conversation we discussed the so-called straw deals."
> (Emphasis supplied)

Finally on March 22, 1966, Special Agent Johnson warned Rogers of his Constitutional rights in a limited way (TSH 285). His responses to the following questions are significant:

> "A. And that if anything was wrong with the partnership tax return, willfully, it was a criminal matter. And I advised him that he did not have to talk to me or give me any information unless he so desired.
>
> Q. Sir, in connection with that warning, did you warn him that there were other matters, non-tax criminal matters of which you had knowledge?
>
> A. No.
>
> Q. Your warning was related strictly to possible criminal liability for the filing of a fraudulent or false partnership return, is that correct, Sir?
>
> A. That is correct." (TSH 286)

The outcome of the alleged tax investigation of Appellant Rogers is disclosed on Page 45 of Government's Response to his Motion to Suppress Evidence: "As a result of the examination of these records, a civil income tax investigation was opened with regard to defendant Rogers on April 7, 1965, resulting ultimately in a refund to him."

In January, 1967, realizing that the government could not prosecute the defendants in Virginia for any violation of Title 18, U. S. Code, (TSH 134), the indictment was delayed due to other Project Metro cases (TSH 141,142).

The defendants herein were not indicted until September 22, 1967.

A single tax prosecution,not involving any of the defendants in this case,resulted from the massive effort of the metro project (TSH 139) in this and its many other "tax" cases.

B. The Indictment

The Appellant and codefendants were indicted on September 22, 1967, before a Grand Jury sworn March 1, 1967. The Grand Jury sat April 28, May 5, May 12 and June 23, 1967 (Pg. 25, Schedule A, Government's Consolidated Response to Motion of Defendants' Requests for Bills of Particulars Pursuant to Rule 2).

Counsel for Reynolds, joined by Counsel of the other defendants, moved the Trial Court to dismiss the indictment on the grounds that witnesses appearing before the Grand Jury had been illegally sworn to secrecy. On August 5, 1968, the Court below heard the motion as well as testimony from the Grand Jury foreman, Swain, and later denied the Motion. At this point no further irregularities were discernable to Counsel for the defendants.

After this Court decided Gaither v. United States, 134 App. D. C. 154, 413 F2d 1061 (1969) the defendants moved to dismiss the indictment on the grounds that the indictment returned September 22, 1967, did not reflect the will of the Grand Jury and that it violated the rights of the defendants under the Fifth Amendment and Rule 6(f) F. R. Cr. P. A hearing was held April 28, 1969, for the defendants to present evidence of the alleged fatal defects of the indictment. At this hearing the foreman, Evan L. Swain, testifies that (1) he was the foreman of the Grand Jury (T.Q. 9), (2) that the Grand Jury met

April 28, May 5, May 12, June 23 and September 22, 1967, (T.Q. 12), (3) that the indictment as drawn was in an envelope or folder (T. Q. 16), (4) that the foreman did not read the indictment to the Grand Jurors (T. Q. 17), (5) that the Department of Justice Attorney read only the first part of the indictment (T. Q. 20), and (6) that the foreman himself did not read the indictment (T. Q. 19). The representations made to the Court by Counsel for both sides do not controvert the fact that the Grand Jury met less than 18 minutes on September 22, 1967, (T. Q. 33) and that the last testimony presented to the Grand Jury on this case was June 24, 1967, 90 days previous to the return of the indictment (T. Q. 33).

The District Court denied the Motions to Dismiss (Opinion and Order entered May 2, 1969, as not being timely filed without consideration of the merits. 300 F. Supp. 503 (D.C. 1969).

Defendants immediately moved for reconsideration on the ground that the defect alleged was jurisdictional, that the Motion in any case was timely and that no Counsel for any of the moving defendants had known at any time prior to April 21, 1969, of the facts on which they relied for their Motion (Motion of Defendants Reynolds, et al, for Reconsideration and Stay, and attached affidavits, filed May 2, 1969).

The Court denied the Motion for Reconsideration from the Bench after argument on May 5, 1969, and Counsel for defendants thereafter filed, in this Court, a petition in the nature of Prohibition or Mandamus seeking a stay of the trial pending

full briefing and argument on the jurisdictional issue in this Court, and an Order directing the Court below to hear and decide the Motion to Dismiss on the merits. This Court summarily denied that Motion (Case No. 23006) and the trial commenced on the afternoon of May 5, 1969.

After trial Rogers timely filed a motion in arrest of judgment or, in the alternative, to dismiss the indictment because of the defects in the indictment which motion was either joined in or similar motions were filed by the other defendants. That motion was denied (Opinion and Order, December 24, 1969).

C. The Trial

At the trial the government's evidence showed, in sum, that the Defendant Reynolds, aided and abetted by the other defendants had obtained the refinancing of homes on which the Bank had previously supplied construction financing by the use of mortgage loan transactions utilizing "straw" purchasers. The proceeds of these apparent sales were used to pay off the outstanding construction loans thus effectively reducing the amount of outstanding construction loans in the name of Reynolds Construction Company from the Bank records. Twelve of these "straw purchasers" had not agreed to act as such nor to the use of their names and, in point of fact, their names had been selected from the Harvard Alumni Directory. Defendant Freeman testified that he had selected and used the names of

these twelve fictitious "straw" parties without the knowledge or consent of any of the other defendants (T.T. 586).

The Government limited the testimony from the two officials of the Bank, whom it called to testify, solely to the "general practice" of the Bank in acting on loan applications avoiding all reference to the Bank's actual practice in the specific transactions named in the indictment. Further, cross-examination of all witnesses concerning these specific transactions was successfully objected to by the Government on the grounds of being beyond the scope of the direct examination (T. T. 127, 128, 544-47).

As it was not the "general practice" of the Bank to do so, credit reports were not obtained (T. T. 127). It was also the general practice of the Bank to lend 70 to 80 per-cent of the appraised value of property (T.T. 130).

Robert L. Stoy, Assistant Treasurer and Settlement Officer of the Bank testified that it was the practice of the Bank to make loans on the appraised value of the property "--and that alone. (T.T. 135). He also testified at another point that an application for a loan would not be considered if it was found to be based on false information (T.T. 146). However, Government's exhibits 2-A through 2-Q set forth the appraised value of each property as determined by the two Bank appraisers together with their recommended loan values, and in each instance and without exception each loan was approved in exactly the same amount recommended by the appraisers.

The Government not only successfully prevented the defendants from developing on cross-examination the specific practice of the Bank in the 17 transactions named in the indictment, it also failed to develop such specific evidence from its own witnesses who were key Bank officials in acting on many of the loans specified in the indictment. For example, Government Exhibit 2-B shows Government witness Harrison, then Executive Vice-President of the Bank, as the officer who recommended the loan and Government witness Stoy as the officer approving the loan, such recommendation and approval being for a loan identical in amount to that recommended by the Bank's appraisers. The Court's difficulty with this apparent shortcoming of the Government's case is exemplified by the following colloquoy after the Government rested its case:

"THE COURT: Where are they? Where are the people that dealt with these transactions? If they are dead, the Government ought to say so. If they are in Viet Nam, the Government ought to say so. Are you in a position to advise the Court why they were not here?

MR. BURNS: Right now, I am not sure that Stoy was not one of those persons. Mr. Harrison, I believe, was. The question wasn't asked of him with respect to these transactions.

THE COURT: If Mr. Harrison was the person involved in 1962, pray tell why you didn't ask him about these specific transactions?

MR. BURNS: I cannot answer the question. I can't answer why the question was not asked."
(T.T. 643-644).

Government enhibits 7-A, 7-D, 7-E, 7-g and 7-H, introduced without objection from Rogers's Counsel, shows that Rogers and his wife acted as a straw purchaser of a Reynolds

property in a transaction similar to those involving 'real' straw parties set forth in Count One (1) of the indictment.

SUMMARY OF ARGUMENT

Appellant Rogers argues that the Government investigation of the several defendants which preceded the indictment in this case was conducted in violation of his Constitutional rights. The investigators were engaged in a general search for evidence of crime and abused the civil tax investigative authority granted by Title 26, U.S.C., Section 7602.

He further argues that the Indictment presented against him should be dismissed because it had not been read by any member of the Grand Jury, it was not concurred in by the requisite number of Grand Jurors and that it violates his rights under the Fifth Amendment to the Constitution of the United States.

In addition, he argues that the Government cannot prove the essential element of reliance through evidence adduced of general practice of the putative victim while officials of the putative victim testified and introduced documents of the transactions set forth in the indictment, yet he was prevented to cross-examine these officials as to their actual reliance upon the documents submitted in evidence.

He also argues that the Government purposely delayed a period of three years before seeking the present indictment.

And further argues that the Trial Court erred in not giving the Missing Witness Instruction and in denying the motion for a new trial or for acquital after presentation of new evidence establishing knowledge of the putative victim.

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ARGUMENT

There are two aspects of the Government's investigative effort of which Defendant Rogers complains: (1) the deceitful abuse of the authority granted by Title 26, U.S.C., Section 7602, Internal Revenue Code; and (2) the failure to warn him that he was under possible criminal investigation at a time when material evidence was obtained in violation of his Constitutional rights.

1. DECEITFUL AND FRAUDULENT USE OF SECTION 7602.

The Court below found with regard to the investigation in the instant case (App.[2]) that:

> "(1) Prior to the year 1963, the Internal Revenue Service and the United States Department of Justice formed a special project to investigate alleged bribery among certain officials of the County of Fairfax, Virginia. Specific focus was directed to the Fairfax County Board of Supervisors, of which the Defendant, A. Claiborne Leigh, was formerly chairman. This special project was known as the 'Metro Project.' It was staffed by revenue and special agents of the Internal Revenue Service and received legal assistance from the Justice Department through its Organized Crime and Racketeering Section."

However, despite this finding, the Court below also found that the investigation did not become "criminal" in nature until December, 1963, when the revenue agent first thought he might have uncovered evidence of crime in Defendant Leigh's books and referred the case to the intelligence division.

It is respectfully submitted that the Court's finding of fact in this regard was in error.

From its inception the government investigation which culminated in the indictment in this case was a general search

for evidence of criminal activity clothed in the guise of an income tax investigation. The formation of "Project Metro" is enlightening:

> There were allegations of bribery and corruption among the local county officials of Fairfax County, Virginia.
>
> Special and revenue agents of the Internal Revenue Service from various parts of the United States were ordered to Washington, D.C., and assigned to a special project which became known as "Metro Project." A separate office in a separate location from the regular IRS offices was established. A legal advisor from the Organized Crime and Racketeering Section of the Department of Justice was assigned to the unit.

Yet the Government asserts (surely "tongue in cheek") that this investigation commenced as a "civil" tax audit and thus permitted the use of its authority under Title 26, U.S.C., Section 7602, Internal Revenue Code, which authorizes the interrogation of persons and the obtaining of data "for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax - - -."

It does not appear why the Federal Bureau of Investigation, the customary investigative arm of the Department of Justice, and the agency which conducts most non-tax criminal investigations for the Federal Government, was not used to assist the Organized Crime and Racketeering Section of the Department of Justice to investigate the alleged corruption and bribery. One must conclude that the civil tax audit authority of the Internal Revenue Service was the persuasive factor in the

selection of the Internal Revenue Service rather than the Federal Bureau of Investigation investigation.

The testimony of the IRS agent in the case also bears out Keating makes it clear that this was an investigation which might involve possible criminal prosecution. He was an investigation from the outset of alleged criminal misconduct (briberies) with a prime suspect in mind (Defendant Leigh, before the first investigation left the specially established office where the special investigative squad was. The attachment to this special squad of the author of the Organized Crime Statute (Title 18, U.S.C., Sect. 1951) as a legal advisor was in no way calculated to assist in a mere civil "tax" investigation. No, the plain fact is that bribery and corruption, not taxes, were the purpose of the investigation and the accusatory stage was set and reached before the first visit to Defendant Leigh's office and the obtaining of the records of the law firm of Leigh & Rogers.

In fact, it is interesting to note that only a single tax prosecution resulted from the massive efforts of Project Metro's special squad.

It is well established that misrepresentations made by Government agents for the purpose of securing incriminating evidence violates the Fourth and Fifth Amendments to the Constitution of the United States and require the suppression of all proof obtained thereby. Bumper v. N.C., 391 U.S. 543 (1968); Wong Sun v. U.S., 371 U.S. 471 (1963); Gouled v. U.S., 255 U.S. 298 (1921); Smith v. Ahrt, 419 F.2d 160 (5th Cir.1969);

U.S. v. Tonahill, 300 F. Supp. 97 (E.D. Tenn. 1969), and see U.S. v. Guerrina, 112 F. Supp. 126, 130 (E.D. [illegible] 1953), aff. 126 F. [illegible]p. 609:

> "The dividing line between proper investigative procedures and those which encroach upon constitutionally guaranteed rights is [illegible] ill-defined, but the device here used, that of representing a criminal investigation to be a civil audit, places itself squarely on the wrong side of that line."

The Court below (App. [21]) found that the Government should have warned Defendant Leigh of his Constitutional rights and did so prior to his interrogation on January 20, 1964. The alleged criminal items uncovered by December, 1963, involved aspects of the straw transactions (at the Topsfield subdivision files which were microfilmed January 20, 21, 22, 23, 1964.) Defendant Rogers had signed many of the checks and settlement sheets in the straw transactions set forth in the indictment so it is difficult to understand why, by the same reasoning, Defendant Rogers was not similarly entitled to a Constitutional warning. Since these transactions were handled by the firm of Leigh & Rogers, it is obvious that if they were criminal as on the part of Leigh they were the same on the part of Rogers. Yet, on the contrary, Special Agent McElroy on February 13, 1964, affirmatively misled Defendant Rogers in the strongest possible language (TSH 126):

> "I was not investigating him [Rogers], I told him I was not investigating him, and I also tried to make it clear to him that I definitely was not doing it"

Many cases hold that the question turns on the issue of affirmatively misleading, see U.S. v. [illegible], 275 F.2d 94 (3rd Cir 1960); U.S. v. Achilli, 234 F.2d 791 (7th Cir 1956) aff'd.

353 U.S. 373 (1957); Palmisano v. U.S., 226 F. Supp 562 (N.D. N.Y. 1963); U.S. v. Turnzynski, 268 F. Supp. 847 (N.D. Ill. 1967).

The Government practiced a fraud and deceit upon the Defendants Leigh and Rogers and all material evidence and leads therefrom obtained by the Government from them , or their law firm, should have been suppressed. As Judge Will's Memorandum Opinion, U.S. v. Turnzyski, supra, recites:

> "Whether a suspect is induced to incriminate himself by a combination of ignorance of his rights and the coercive atmosphere of custody, or by ignorance of his rights combined with the inference that the purpose of the interrogation is simply to ascertain his dollars and cents liability for taxes, the result is the same. In some respects the tax investigation is more insidious and dishonest than the custodial interrogation, for the suspect in custody well knows his interrogators are seeking evidence to convict him of a crime while a tax suspect is permitted and even encouraged to believe that no criminal prosecution is in contemplation."

2. FAILURE TO WARN OF CONSTITUTIONAL RIGHTS

In Miranda v. Arizona, 384 U.S. 436, 479 (1966) the Supreme Court held that a criminal suspect -

> "- - - must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

The Supreme Court had previously held in Escobeda v. Illinois, 378 U.S. 478 (1964), that when the investigation shifts to the accusatory phase the suspect is entitled to a warning of his Constitutional rights. The Trial Court

concluded that, even in tax cases, when the accusatory stage is reached, warnings of Constitutional rights are required and quotes with approval from U.S. v. Carlson, 260 F. Supp 424, 428 (E.D. N.Y. 1966):

> "The cases assume that interrogation is relatively free as between government and taxpayer until some ill defined zone is reached in which fairness requires the government to alert the defendant that the theoretical risk of a criminal prosecution implicit in any investigation of an imperfect return has become a matter of pointed interest on the part of the government, whether or not the government has resolved to proceed. At some point the Government's further questions may become an attempt to take testimony in aid of prosecution rather than as part of an investigation."

The Trial Court, after reviewing Escobeda, Miranda and other cases, concluded (App. [19]):

> "In sum, until the accusatory stage is reached and the underlying evils which Miranda sought to combat are present, warnings of constitutional rights are not required. The mere that criminal prosecutions may result from a civil tax audit does not trigger the inception of the accusatory stage."

The Trial Court found, however, that the accusatory stage was not reached until the uncovering of evidence of bribery involving Defendant Leigh in December, 1963. However, the history of Project Metro makes it clear that the accusatory stage existed from the outset. There were allegations of bribery and corruption (specific crimes) against officials of the Fairfax County Government (specific persons). The IRS Special Agents are trained criminal investigators who customarily enter the case after the revenue agent discovers evidence of criminal misbehavior.

In Project Metro it was the other way around. The Special Agents sent the revenue agents out in the first instance. Calling it a tax investigation and utilizing the peculiar benefits of Title 26, U.S.C., Section 7602, to gain documentary evidence did not change the essential character of the investigation from criminal to civil.

It does seem disgraceful in these enlightened times to continue to permit the facilitation of non-tax criminal investigations through the fiction of a "tax" investigation; thus gaining free and unbridled access to the records and the full cooperation of taxpayers who believe they have paid their lawful taxes and whose cooperation is later rewarded with an indictment unrelated to taxes. This deceitful method of gaining access to records and information as a tool of the criminal investigator must not be countenanced. The Court in U.S. v. Dickerson. 413 F.2d 1111, 1116 (7th Cir. 1969) states:

> "As noted in Lipton, 'Constitutional Rights in Criminal Tax Investigations,' 45 F.R.D. 323, 336 (1968), the pressures on the uninformed taxpayer to cooperate with the agents are considerable:
>
> > 'First, there is always the fear of incurring a civil tax liability that hopefully might be avoided by cooperation. Also, a taxpayer may conclude that lack of cooperation will result in unwanted publicity about a tax liability. The average citizen, moreover, believes that the government prosecutes only the recalcitrant, uncooperative individual who is unwilling to pay what he owes. Who would believe the ironic truth that the cooperative taxpayer fares much worse than the individual who relies upon his constitutional rights.' (Emphasis supplied.)
>
> [3] Incriminating statements elicited in reliance upon the taxpayer's misapprehension

> as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings. Cf. Gouled v. United States, 255 U.S. 298, 305-306, 41 S.Ct. 261, 65 L.Ed. 647; United States v. Guerrina, 112 F.Supp. 126 (E.D. Pa. 1953) modified 126 F.Supp. 609 (E.D. Pa. 1955); Comment, 'Constitutional Rights of the Taxpayer in a Tax Fraud Investigation.' 42 Tul.L.Rev 862, 864-865 (1968)."

In sum, it is Defendant Rogers's contentions that all of the material evidence obtained from Defendants Leigh and Rogers and the other defendants, whether oral or documentary, should be quashed since it was obtained in a fraudulent and deceitful manner in the course of a criminal investigation in violation of his Constitutional rights; or, in the alternative, that the documentary and other evidence obtained from him from and after February 19, 1964, should be quashed as evidence against him since the Government investigation had already reached the accusatory stage with regard to Defendant Leigh regarding the transactions and documents which are the subject of this indictment, which were prepared by the firm of Leigh & Rogers and necessarily involved the Defendant Rogers as well as the Defendant Leigh; and, in any event, that by October 28 and November 6, 1964, if not before, the Government investigation had reached the accusatory stage as to him and that all material evidence, oral or documentary, obtained from him on or after October 28, 1964, should be quashed.

Yet no warning of his Constitutional rights was given Defendant Rogers during lengthy interrogations on October 28, 1964, and November 6, 1964, regarding the straw transactions which are the subject of this indictment or during the audit of his personal tax returns which commenced April 7, 1965 - almost a year before Defendant Rogers received his first warning of possible criminal involvement - and even then the Social Agent who gave the warning significantly restricted it to "the partnership tax return."

Can there be a clearer case of not only failure to warn of Constitutional rights, but of affirmative deceit and misleading of the clearest sort? We respectfully submit that Defendant Rogers was entitled to have the evidence against him quashed. It is the burden of the Government to show, if it can, that his conviction resulted from the use of untainted evidence. U.S.v. Wainwright, 284 F.Supp. 129 (D.Colo 1968).

ISSUES 2 and 3
THE MOTION TO DISMISS AND ITS TIMELINESS

Appellant Rogers adopts the arguments submitted by Appellants Reynolds and Freeman in support of Issues Nos. 2 and 3, denial of Defendant's motion to dismiss the indictment because it had not been read in its entirety by any member of the Grand Jury nor concurred in by the requisite number of Grand Jurors, and the Trial Court's ruling that the motion to dismiss was not timely filed. But calls attention to the testimony of the foreman of the Grand Jury that it was 90 days between the date the Jury last met on June 24, 1967, and the date of its abrieviated meeting on September 22, 1967, to return the indictment which none of its members had read.

ISSUES 4 and 5
RESTRICTING PROOF TO GENERAL PRACTICE RATHER THAN ACTUAL PRACTICE IN SPECIFIC TRANSACTIONS AS SPECIFIED IN THE INDICTMENT

Appellant Rogers adopts the arguments submitted by Appellants Reynolds, Freeman and Stamp in support of Issues Nos. 4 and 5 regarding the Government's use of the Bank's general banking practice to prove the essential element of reliance, rather than evidence of actual reliance on the allegedly false documents specified in the indictment; and the refusal to permit cross-examination of Bank officials as to its actual practice in the instances specified in the indictment after they had testified to its general practice. It should be noted, however, that scrutiny of Government's exhibits 2-A through 2-Q (the "loan applica-

tions") shows the appraised calue of each property specified in the indictment as determined by the two Bank appraisers, together with their loan recommendations, and in every instance the loan approved by the Bank is in the exact amount recommended by the appraisers, further supporting the Defendants' contentions that the Bank relied on the appraisals of its appraisers "and that alone" as its Assistant-Treasurer and Settlement Officer, Robert L. Stoy, testified. This reliance is not so unusual when one remembers that since the Bank had supplied the construction money for each property it well knew at each stage of construction,from ground breaking to completion, and from its own inspectors, the quality of the construction which went into each house.

It is no wonder that the Trial Court showed its impatience with the Government's failure to put on evidence in regard to the Bank's actual practice in the specific transactions named in the indictment.

ISSUE 6
GOVERNMENT DELAY IN SEEKING THE INDICTMENT

Defendant Rogers adopts the argument of Defendant Stamp regarding the Government's unreasonable delay in seeking an indictment.

ISSUE 7
FAILURE TO GIVE THE MISSING WITNESS INSTRUCTION

Appellant Rogers adopts the arguments submitted by Appellants Stamp and Freeman as to Issue No. 7, the Missing Witness In struction which was not given the jury.

ISSUE 8
DENIAL OF MOTION FOR A NEW TRIAL BASED ON DOCUMENTARY PROOF OF KNOWLEDGE

Appellant Rogers adopts the argument submitted by Appellant Reynolds as to Issue No. 8 alleging error in the denying the motion for a new trial after presentation of documentary evidence establishing knowledge of the putative victim inconsistant with its alleged reliance on the alleged false documents specified in the indictment.

CONCLUSION

Appellant Rogers respectfully prays that the judgment of conviction be reversed and that the case be remanded with directions to enter a judgment of acquittal, or, in the alternative, to dismiss the indictment, or, further in the alternative, to grant a new trial.

Respectfully submitted,

Farley W. Warner
2017 Que Street, N.W.
Washington, D.C. 20009

Counsel for Appellant Rogers

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

Two copies of the foregoing Brief of Appellant Rogers were mailed, first class, postage pre-paid, this ____ day of October, 1970, to Bruce Burns, Esq., Department of Justice, Washington, D.C., Counsel for Appellee. One copy was mailed to each of the following: Lester M. Bridgeman, Esq., 420 Executive Building, Washington, D.C., Counsel for Appellant Harlan E. Freeman; Vincent J. Fuller, Esq., Williams & Connolly, 1000 Hill Building, Washington, D.C., Counsel for Appellant Walter R. Reynolds; and Stanley M. Dietz, Esq., 1029 Vermont Avenue, N.W., Washington, D.C., Counsel for Appellant R. Marbury Stamp.

Farley W. Warner

TITLE 26, U.S.C. Section 7602, INTERNAL REVENUE CODE (1964), in part, provides:

> - - -. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting and such liability, the Secretary or his delegate is authorized - - -
>
> (1) To examine any books, papers, records, or other such data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24197

UNITED STATES,

Appellee

v.

E. NEIL ROGERS,

Appellant

Appeal from Judgment
of the United States
District Court for the
District of Columbia

REPLY BRIEF FOR APPELLANT

Farley W. Warner

2017 "Que" Street, N.W.
Washington, D.C. 20009.

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STATEMENT OF ISSUES PRESENTED

1. The Government's Brief, in its statement of facts and argument, seeks to cast the Project Metro Investigation as a "civil tax audit" by referances to the transcripts which are not supported by the actual portions of the transcripts cited.

2. The Government's Brief erronously seeks to establish December, 1965, as the date the investigation reached the accusatory stage with regard to Appellant Rogers and the other defendants in this case with the exception of defendant Leigh.

3. The Government's Brief makes a number of material mis-statements of fact which are allegedly supported by the record, but an examination of the cited portions of the record do not support the statements.

4. The Government's Brief seeks to minimize and excuse the Government's failure to properly and fully advise the Grand Jury in regard to the contents of the indictment which it was then considering, by an alleged proffer showing that the Grand Jury met at the unusually early hour of 9:15 A.M. on the morning it returned the indictment, which alleged proffer is not supported by the record in this case.

5. The Government's Brief [Sect. II, page 20, line 15] erronously states that "Examinations of the record itself shows that Appellants were not, as they claim (and as the Trial Court thought), restricted in their cross-examination of the bank officials as to the specific loans here in issue."

ARGUMENT

I

THE GOVERNMENT'S BRIEF, IN ITS STATEMENT OF FACTS AND ARGUMENT, SEEKS TO CAST THE PROJECT METRO INVESTIGATION AS A "CIVIL TAX AUDIT" BY REFERENCES TO THE TRANSCRIPTS WHICH ARE NOT SUPPORTED BY THE ACTUAL PORTIONS OF THE TRANSCRIPTS CITED.

On page 8, line 9, of its Brief, the Government states that the "primary purpose of the 'Metro Project' was to determine if there was any civil tax liability, etc., - - -." But the cited portions of TSH [1/] do not support the statement. On the contrary, pages 5 & 6 of Appellant Rogers's Brief and the portions cited therein make it clear that Project Metro was staffed, from the outset, with both Special Agents (criminal investigators) and revenue agents (civil tax investigators). And the statement appearing in the Government's Brief in the first full paragraph on page 11 that "All the revenue agents testified at the hearing that they considered that they were doing civil tax audits and not conducting criminal investigations" is additionally misleading for revenue agents do not conduct criminal investigations which are the special province of the Special Agents of the IRS.

Revenue agent Evangelist described Project Metro as follows:

> "Q. Could you tell the Court what you were told about the function of that office? [Project Metro Office]

1/ Used herein and in the Government's Brief to designate the transcript of the Hearing on the Motions to Suppress held June 4 and 5, 1968.

"A. Well, the function of the office was that we were investigating or we were investigating bribery in Fairfax County of public officials.

Q. This was your function and your function was to assist in this investigation of bribery?

A. Yes, Sir." (TSH 43). Emphasis supplied.

Further, the statement appearing on page 10, line 2, "When McElroy learned that Evangelist was to do these audits, etc., -- (TSH 49, 210) " is not only NOT supported by the cited portions of the transcript but, in fact, McElroy, the Special Agent (criminal investigator) gave Evangelist (the revenue agent) his instructions and what criminal evidence to look for before Evangelist conducted his first "audit." (TSH 46, 47).

II

THE GOVERNMENT'S BRIEF ERRONOUSLY SEEKS TO ESTABLISH DECEMBER, 1965, AS THE DATE THE INVESTIGATION REACHED THE ACCUSATORY STAGE WITH REGARD TO APPELLANT ROGERS AND THE OTHER DEFENDANTS IN THIS CASE WITH THE EXCEPTION OF DEFENDANT LEIGH.

In the first sentence on page 11 and the last paragraph on page 31 of its Brief the Government seeks to establish December, 1965, as the date when the so-called "true nature" of the straw transactions was established. The Brief ignores the record. It admits that in December, 1963, the Government learned of the possible criminal nature of the straw transactions. (pg. 29, line 7). Appellant Rogers's Brief shows, from the record, in chronological order that thereafter in January and February, 1964, Government criminal investigators interrogated defendant Leigh and Appellant Rogers, the accusatory stage having admittedly been

reached as to Leigh but allegedly not as to Rogers; examined and copied the "straw transaction" settlement files and records of the law firm of Leigh & Rogers; suspected and later verified the non-existance of the "straw parties" through checks of the local telephone directory and the records of Fairfax County, Virginia; in February and March, 1964, examined the records of Reynolds Construction Company, especially those relating to the straw transactions, and interrogated defendant Freeman on July 6, 1964, when he admitted to them that he, acting alone, had used names from the Harvard Alumni Directory in personally preparing the documents in the twelve transactions named in the indictment involving non-consenting straw purchasers, all without the knowledge of the other defendants.

Thus, it is clear, that by July 6, 1964, the Government was in possession of all of the information necessary for it to determine the "true nature" of the straw transactions. And the affidavits secured in December, 1965, and during 1966, only confirmed its prior knowledge. The Government's present attempt to establish the December, 1965, date is nothing more than a self-serving attempt to excuse its failure to safeguard the Constitutional Rights of Appellant Rogers in the course of the lengthy interrogations of him on October 28, 1964, and November 6, 1964, the "civil tax" audit of Appellant Rogers in April, 1965, and its prosecutorial delay with regard to all of the defendants in this case.

If the Government failed to properly assess the facts which

were in its possession by July 6, 1964, then the defendants should not be prejudiced by this failure nor by the Government's unaccountable failure to immediately obtain the affidavits which it now contends disclosed to it in December, 1965, the so-called "true nature" of the straw transactions. Special Agent McElroy, the principal investigator during the pertinent period, testified when asked to account for this delay: "No, I haven't any answer as to why I took that long." (TSH 182).

III

THE GOVERNMENT'S BRIEF MAKES A NUMBER OF MATERIAL MISSTATEMENTS OF FACT WHICH ARE ALLEGEDLY SUPPORTED BY THE RECORD, BUT AN EXAMINATION OF THE CITED PORTIONS OF THE RECORD DO NOT SUPPORT THE STATEMENTS.

[A] Although no specific portion of the transcript is cited, on page 16, line 13, the Government's Brief, (apparantly seeking to support the conspiracy theory of Count I of the indictment), makes the flat assertion that "- - - it is undisputed that defendants knew that the documents submitted to Eastern contained forged signature and false information etc., - - -" Quite to the contrary, Appellant Rogers flatly denies this assertion. Though his law firm, and he personally, in some instances, handled the settlements in the transactions named in the indictment, the Court below specifically held - "A straw transaction in and of itself is not illegal." (TR 302).

And when the defendants in the trial below sought to refute the inference that personal attendance of the purchasers of real

estate is required at settlements (and therefore non-attendance implies knowledge and complicity by the settlement attorney) by a proffer showing that Mr. Thomas Harrison, a principal Government witness and the then President of Eastern Savings and Loan Association, did not personally attend a settlement conference at the office of Appellant Rogers when he (Harrison) purchased real estate in 1967, the Court below ruled that it was "absolutely immaterial" over the defendants' objections. (TR 674, 675).

Defendant Harlan Freeman testified that he, and he alone, picked the names of the twelve non-consenting "straw parties" from the Harvard Alumni Directory, prepared the purchase contracts and credit applications, and signed the contracts in the names of such straw parties. As defendant Freeman testified:

> "Q. Can you state what information if any you supplied to any other defendant in this case about the actions you just described?
>
> A. I didn't say anything to any of them until the summer of 1964.
>
> Q. What happened at that time, Mr. Freeman?
>
> A. At that time I was informed by revenue agent Evangelist that he wanted to make a routine audit of my tax returns and he questioned me about the $200 straw fees in the presence of Mr. Leigh, and I told him then that I had made up these names."
> (TR 687) Emphasis supplied.

There was no testimony or other evidence whatsoever contrary to Freeman's testimony.

[B] On page 18, the first paragraph, it seeks to establish that the alleged false credit applications were material to the

decision of Eastern Savings and Loan Association to make the loans in question. The reasoning appears to be that even though Government witness Stoy testified flatly (TR 135) that the appraised values of the properties was the basis of loan determination, and that the Association did not seek to verify any of the financial or other information submitted (TR 126, 127, 132, 146), Government witnesses Harrison and Stoy testified affirmatively, when questioned, that if the Association had known that the applications contained false information the loans would not have been made; therefore, ergo, the false applications were material to the loan determinations.

The Government, recognizing that it did not have actual proof of reliance in the specific transactions named in the indictment, has sought to supply this critical deficiency by the questionable inductive reasoning process described above and by also limiting the testimony of those witnesses to the general practice of the Association (see Section V, infra).

IV

THE GOVERNMENT'S BRIEF SEEKS TO MINIMIZE AND EXCUSE THE GOVERNMENT'S FAILURE TO PROPERLY AND FULLY ADVISE THE GRAND JURY IN REGARD TO THE CONTENTS OF THE INDICTMENT WHICH IT WAS THEN CONSIDERING, BY AN ALLEGED PROFFER SHOWING THAT THE GRAND JURY MET AND THE UNUSUALLY EARLY HOUR OF 9:15 A.M. ON THE MORNING IT RETURNED THE INDICTMENT, WHICH ALLEGED PROFFER IS NOT SUPPORTED BY THE RECORD IN THIS CASE.

A close and detailed examination of the entire record, including the transcripts, fails to disclose any proffer of the Government regarding the meeting of the Grand Jury at 9:15 a. m. September 22, 1967.

V

THE GOVERNMENT'S BRIEF [SECTION II, PAGE 20, LINE 15] ERRONOUSLY STATES THAT "EXAMINATIONS OF THE RECORD ITSELF SHOWS THAT APPELLANTS WERE NOT, AS THEY CLAIM (AND AS THE TRIAL COURT THOUGHT), RESTRICTED IN THEIR CROSS-EXAMINATION OF THE BANK OFFICIALS AS TO THE SPECIFIC LOANS HERE IN ISSUE."

On the contrary, the record shows that Mr. Dillon, trial counsel for Appellant Reynolds, in cross-examination of Government witness Stoy, sought to open a line of examination as to the practices of the Savings and Loan Association in its handling of the 17 transactions named in the indictment (TR 126, 127) but the Government's trial counsel objected as follows:

> "MR. MOLENOF: I object on the ground this is outside of the direct. He was asked about general practice."
> (TR 127) Emphasis supplied.

The objection was sustained.

The Government's trial counsel had carefully restricted his direct examination of this witness, "- - -, I ask you with respect to the general practice at Eastern Building [sic] or Savings and Loan Association in 1962 and 1963, concerning just what procedure is followed after an application for a loan is filed - - -" (TR 120).

Again, Government counsel inquired only as to the general practice in regard to procedures of the Association following receipt of the title binder from the settlement attorney. (TR 121) In fact, all of his 33 questions of this witness on direct examination dealing with the loan practices of the Association related only to its general practice. (TR 120-125 inc.) And all of the 12 questions which Governmentcounsel asked of Government witness Harrison on direct examination regarding transactions named in the indictment related only to the general practice and policy of the lender. (TR 532-535 inc.)

It ill becomes the Government, having deliberately and successfully embarked on a trial technique of restricting examinations of key government witnesses to the general practices of the Association, for the first time and on appeal, to now claim that defense counsel, and the Trial Court, misunderstood that this deliberate technique was, in fact, intended to accomplish its obvious and only purpose. Despite the abortive attempt to shift the blame, the central fact remains: the testimony is restricted only to the general practices of the Association, not its practices in the transactions named in the indictment, and the Government is solely and intentionally responsible for it.

CONCLUSION

Appellant Rogers respectfully prays that the judgment of conviction be reversed and that the case be remanded with directions to enter a judgment of acquittal, or, in the alternative, to dismiss the indictment, or further in the alternative, to grant a new trial.

Respectfully submitted,

Farley H. Warner

Farley H. Warner

2017 "Que" Street, N.W.
Washington, D.C. 20009

Counsel for Appellant Rogers

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

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Farley W. Warner

Farley W. Warner